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No. 10-1023

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID C. TABB, pro se,

Petitioner,

vs.

MARY R. BORDIER, Assessor of
Jefferson County, West Virginia,

Respondent.

**On Petition For A Writ Of Certiorari
To The Circuit Court Of
Jefferson County, West Virginia**

PETITION FOR REHEARING

DAVID C. TABB, Pro se petitioner
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PETITION FOR REHEARING

NOW COMES, your Petitioner Shenandah Sales and Service, Inc., a closely held corporation by its vice president and agent, David C. Tabb, pro se, pursuant to Rule 44.2 of the Rules of the United States Supreme Court and moves the Court to reconsider its denial of Certiorari on the grounds and basis that intervening circumstances of a substantial or controlling effect now exist that would militate in the granting of rehearing and ultimately Certiorari.

I. Questions Initially Presented To This Court For Review

Petitioner would first briefly summarize the two issues that were presented for review to this Court in the original Petition to wit:

1. Were the actions of the Circuit Court of Jefferson County, West Virginia and thereafter the West Virginia Supreme Court of Appeals a violation of Petitioner's Fifth Amendment right to Due Process of Law when the Circuit Court dismissed without a hearing Petitioner's Appeal of the decision of the Jefferson County Commission sitting as a Board of Review and Equalization, which decision increased Petitioner's 2008 Real Estate Tax Assessment, and thereafter when the Supreme Court declined to exercise its discretionary review of said Circuit Court order dismissing Petitioner's Appeal.

2. Was it a violation of the Petitioner's Fifth Amendment right to due process of law for the Circuit Court of Jefferson County to refuse Petitioner an opportunity to present evidence at an evidentiary hearing as to the reasons why he was unable to attach to his Petition for Appeal the record of the hearing that was conducted before the Jefferson County Commission sitting as a Board of Review and Equalization at which time Petitioner intended to offer evidence that he was unable to attach to the Petition for Appeal, the record below because of intentional interference by agents of the State of West Virginia making it impossible to compile and attach said record to his Petition?

II. Facts Upon Which Issues Initially Presented For Review Were Based

A. These issues were based on the following facts from the proceedings below:

1. On the 12th day of February, 2008, Petitioner appeared before the Jefferson County Commission acting in the capacity of a State/County Board of Review and Equalization.

2. The purpose of the hearing before the Jefferson County West Virginia Commission acting in the capacity of a Board of Review and Equalization was to determine whether the tax assessment for

the calendar year 2008, increasing Petitioner's assessment from the 2007 Assessment of $259,200 to the 2008 Assessment of $499,000 was conducted properly and the Assessment calculated correctly.

3. Petitioner says at the conclusion of the hearing regarding his Appeal to the Jefferson County Commission acting as a Board of Review and Equalization of the increase real estate tax assessment in the amount of $239,800 said assessment was upheld and his Appeal denied.

4. Petitioner says that he timely filed a Petition for Review of said decision by the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, pursuant to West Virginia Code § 58-3-4 and § 11-3-25;

5. Petitioner says that his Petition for Review and Appeal to the Circuit Court of Jefferson County, from the decision of the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, was denied and refused without a hearing on the merits of his Appeal and same further was denied by the West Virginia Supreme Court of Appeals on both June 2, 2010 and October 13, 2010.

III. Facts Upon Which Petitioner Relies That Intervening Circumstances Of A Substantial Effect Now Exist

A. Petitioner would next set forth the facts upon which he relies to argue to the court in good faith that "intervening circumstances of a substantial or controlling effect . . . that were not previously presented" to wit:

1. Re: In the 2009 Case, No. 09-AA-3, on March 18, 2010 the Circuit Court, the Honorable Judge David Sanders, would not accept any motions or filings without an attorney. This case is still sitting in the Circuit Court with an order, dated April 7, 2010, from the West Virginia Supreme Court to move forward. Judge Sanders has only responded one time since April 8, 2010. Mr. Tabb has made numerous attempts to move this case forward, but to date there has been no response from Judge Sanders. The case still is sitting in the Jefferson County 23rd Judicial Circuit.

2. Re: In the 2010 Case, No. 10-AA-1, the Honorable David Sanders, Judge of the Circuit Court of Jefferson County sent a letter dated April 8, 2010, to Mr. Tabb informing him that he would only continue hearing pleadings and motions through a licensed West Virginia attorney. Judge Sanders dismissed this Case on September 14, 2010 without a hearing ever being scheduled or taking place.

This Case was appealed to the West Virginia Supreme Court on January 12, 2011, to date it has not yet been put on the docket.

3. Re: In the 2011 Case, which was filed March 18, 2011, simultaneous with the filing of the Appeal to the Circuit Court, Petitioner Shenandoah Sales and Service, Inc. by its agent, David C. Tabb, filed a motion to disqualify the Honorable Judge David Sanders, Judge of the Circuit Court of Jefferson County. This case was dismissed on March 23, 2011 before Judge Sanders responded to the Motion to Disqualify. Mr. Tabb reminded the Circuit Court and Supreme Court of the Motion to Disqualify on March 29, 2011 and Judge Sanders responded thereto on March 31, 2011. The West Virginia Supreme Court responded on April 11, 2011 and denied the motion to disqualify Judge Sanders allowing him to again dismiss the Appeal. Petitioner filed Notice of Appeal with the West Virginia Supreme Court on April 21, 2011.

Petitioner submits that although the Jefferson County Circuit Court's legal basis to deny to him a substantive Appeal hearing in the 2008 Appeal from the decision of the Jefferson County Court serving as a BORE was based upon underlying facts different than the underlying fact in the (3) three proceedings referred to above, the ultimate end result is/was a denial to your Petitioner of his right to a substantive

Appeal hearing pursuant to W.V. Code 11-3-25 which violated his Fifth Amendment right to Due Process of Law. Petitioner submits that in all three cases i.e. Case No. 09-AA-3, *Shenandoah Sales and Service, Inc., Petitioner v. Assessor of Jefferson County, WV, Angie Banks*, et al., Respondent; Case No. 10-AA-1, *Shenandoah Sales and Service, Inc., Petitioner v. Assessor of Jefferson County, Angie Banks*, et al., Respondent; Case No. 11-AA-3, *Shenandoah Sales and Service, Inc. v. Assessor of Jefferson County, WV, Angie Banks*, et al., Respondents, the Circuit Court of Jefferson County refused to proceed with each case/or permit, or allow your Petitioner the right to be present at the hearing when the Court determined dismissal of the action was legally appropriate in each case. In Case 10-AA-1, *Shenandoah Sales and Service, Inc., Petitioner v. Angie Banks, Assessor of Jefferson County, WV*, et al., Respondents, the matter lies dormant and idle in the West Virginia Supreme Court and may so remain dormant and idle for as long as Case 08-C-121, *Shenandoah Sales and Service, Inc. Petitioner v. Mary R. Bordier, Assessor of Jefferson County, WV*, Respondents did to wit: from November 6, 2008 until June 2, 2010 which is 574 days after filing the Petition for the Appeal without a reason or explanation.

Petitioner submits the rationale for the Circuit Court of Jefferson County actions in the appeals in 2009-2011 is ever more flawed than this case because pursuant to W.V. Code 11-3-25 a corporation may appear by and through an agent when appealing a

case to a Circuit Court from the action of the Commissioners of the County sitting as a Board of Review and Equalization.

ARGUMENT

Petitioner relies on the following decision of this Court in support of this Petition for Rehearing to wit: *Damasco Vincente Rodriguez v. Florida*, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165, No. 83-1367, Nov. 13, 1984 and *Pan American World Airways, Inc. v. Gondeck*, 382 U.S. 25, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965).

In Gondeck supra, the Court held as follows:

> "On June 11, 1962, we denied certiorari. 370 U.S. 918, 82 S.Ct. 1556, 8 L.Ed.2d 499. On October 8, 1962, we denied a Petition for rehearing. 371 U.S. 856, 83 S.Ct. 17, 9 L.Ed.2d 93. We are now apprised, however, of intervening circumstances of substantial ***effect,'* justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of our rules.' *United States v. Ohio Power Co.*, 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.Ed.2d 683. Subsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident. *Pan American World Airways, Inc.*

v. O'Hearne, 335 F.2d 70. In upholding the award, the court cited our decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483. In a subsequent case the Court of Appeals for the Fifth Circuit itself expressed doubt whether its decision in the present case had been consistent with *Brown-Pacific-Maxon*. *O'Keeffe v. Pan American World Airways*, 338 F.2d 319, 325. The court also noted that, 'The Gondeck case stands alone, except for a per curiam opinion.' Id., at 325. This Court reversed that per curiam judgment last *Term, O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 85 S.Ct. 1012, 13 L.Ed.2d 895, so that the present case now stands completely alone.

In *O'Keeffe* we made clear that the determinations of the Deputy Commissioner are subject only to limited judicial review, and we reaffirmed the *Brown-Pacific-Maxon* holding that the Deputy Commissioner need not find a causal relation between the nature of the victim's employment and the accident, nor that the victim was engaged in activity of benefit to the employer at the time of his injury or death. No more is required that the obligations or conditions of employment create the 'zone of special danger' out of which the injury or death arose. Since the Court of Appeals for the Fifth Circuit misinterpreted the *Brown-Pacific-Maxon* standard in this case, and since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, 'the interest

> of justice would make unfair the strict application of our rules.' *United States v. Ohio Power Co.*, supra, 353 U.S. at 99, 77 S.Ct. at 653, 1 L.Ed.2d 683.
>
> We therefore grant the motion for leave to file the Petition for rehearing, grant the Petition for rehearing, vacate the order denying certiorari, grant the Petition for certiorari, and reverse the judgment of the Court of Appeals." 382 U.S. at 25, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965).

In *Florida v. Rodriguez*, supra, the court-held as follows:

> "The Florida District Court of Appeal affirmed the judgment in a per curiam opinion, citing its earlier decision in *State v. Battleman,* 374 So.2d 636 (1979). *State v. Rodriguez,* 389 So.2d 4 (1980). This Court originally denied certiorari, *Florida v. Rodriguez,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981), but two years later granted rehearing and remanded the case to the Florida District Court of Appeal for reconsideration in the light of our opinions in *Florida v. Royer,* 460 U.S. 941, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). *Florida v. Rodriguez,* 461 U.S. 940, 103 S.Ct. 2115, 77 L.Ed.2d 1298 (1983). The Florida District Court of Appeal again affirmed the suppression of the evidence in a one-word order, 443 So.2d 995 1983), and the State has again petitioned for certiorari." 469 US at 2. In Justice Marshal's dissent he wrote: "Recognizing

that the Florida Supreme Court does not provide a forum for error-correcting review of lower court judgments in that State's judicial system, the Florida Attorney General instead filed a Petition for writ of certiorari in this court. Because the Petition did not present any question of general significance, on May 26, 1981, this Court wisely denied certiorari. *Florida v. Rodriguez,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395. Presumably because they were convinced that error had been committed, three Members of the Court dissented from that disposition and stated that they "would grant certiorari and reverse the judgment." The Attorney General of Florida then filed a timely Petition for rehearing.

Rule 51.2 of this Court's Rules requires that the grounds set forth in a Petition for rehearing "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." "The principal ground advanced by Florida in its Petition for rehearing was that a succession of clearly erroneous per curiam decisions of the State district Court of Appeal was having a devastating effect on its prosecutions. As an "intervening circumstance," it noted that the State had filed a Petition for certiorari in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In my opinion neither of these grounds satisfied the terms of our Rule. In any event, the Petition for a rehearing remained on the Court's docket for

the next two years." 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984).

CONCLUSION

Petitioner believes in good faith that when the facts and circumstances upon which he relies are considered in light of these two decisions that his request for rehearing pursuant to Rule 44.2 of the Rules of the Supreme Court should be granted.

Respectfully submitted,

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CERTIFICATION OF GOOD FAITH

Now comes Shenandoah Sales and Service, a closely held corporation, pro se and by its Vice President and agent David C. Tabb and says unto the Court that this Petition for a rehearing is presented in good faith and not for delay.

Shenandoah Sales and Service, Inc.
by its agent, David C. Tabb